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OBSERVATIONS

U P O N

ESTATES FOR LIFE,

RESPECTING

THE DOCTRINE OF WASTE,

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OBSERVATIONS

ON

THE STATE OF THE

UNION

THE COURSE OF THE

# OBSERVATIONS 7

U P O N

ESTATES, FOR LIFE, 518. 4/15  
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*Created by Act of Law,*

AS TENANTS IN TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED,

TENANTS IN DOWER,

TENANTS BY THE CURTESIE:

*Created by Act of the Party,*

AS TENANTS FOR LIFE—AND TENANTS

PER AUTER VIE,

AND

TENANTS FOR YEARS,

RESPECTING

THE DOCTRINE OF WASTE:

W I T H

SOME OBSERVATIONS UPON THE PRINCIPLES OF  
INJUNCTIONS FOR RESTRAINING SUCH  
TENANTS AND OTHERS FROM THE COMMISSION  
OF WASTE,

L O N D O N :

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OBSEVATIONS

ON

ESTATES FOR LIFE

AND  
ON THE  
NATURE OF THE  
PROPERTY OF THE  
TENANTS IN  
THEIR  
PROPERTY

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THE FOLLOWING  
OBSERVATIONS  
ARE SUBMITTED  
TO THE CANDID PERUSAL  
OF THE PUBLIC.

THEY OF NEW YORK

OF THE STATE OF NEW YORK

AND OF THE CITY OF NEW YORK

IN THE CASE OF THE PEOPLE OF THE STATE OF NEW YORK

VS. THE PEOPLE OF THE CITY OF NEW YORK

REFLECTIONS  
UPON  
TENANTS FOR LIFE,

*Created by Act of Law,*  
As Tenants in Tail after Possibility of  
Issue extinct,  
Tenants in Dower,  
Tenants by the Curtesie:

*Created by Act of the Party,*  
As Tenants for Life---and Tenants *per*  
*auter vie.*

With some Observations upon the Principles of  
Injunctions for restraining such Tenants, and  
others, from Waste.

**A**T Common law, a Tenant in Tail  
after possibility of issue extinct,  
though in fact no more than a  
tenant for life, was not punishable for  
waste,

waste, for the inheritance that once was in him, and therefore the law indulged him with that privilege.

Tenants by the curtesie and in dower, were punishable at common law, and subject to pay damages to the value of the waste committed in an action commenced by the owner of the inheritance. But that particular species of tenants who enjoyed estates created by *act of the party*, were not liable to answer in damages or otherwise for any waste committed by them, because it was in the power of the person who created the estate, to impose such terms as he thought proper, and if he neglected it, he had no one to blame but himself. But those particular interests for life, which devolved upon the tenants by *mere act of law*, were always subject to the controul of that law, which gave birth to their existence; and therefore as it was not in the power of the person, who owned the inheritance, to restrain such tenants

from

from the commission of waste, the law took care to secure the inheritance from any injury or destruction such tenants might do to its prejudice.

Though this doctrine respecting tenants for life, *created by the party*, may appear very rational in theory, yet it was found extremely inconvenient in practice, as such tenants took advantage of the ignorance of their grantors, and availing themselves of the protection of the law, frequently committed acts of depredation, not only injurious to the owners of the inheritance, but highly detrimental to the general welfare of the publick.

It is true, there were some doubts amongst the common lawyers, whether a tenant by the curtesie, though created by act of law, was punishable for waste; but the better opinion seems to have been, that he was; and if we consider that he owed his estate merely to the law, the

same

same law that gave it him, by no means gave him a power of doing any thing which would be detrimental to the owner of the inheritance: such doctrine would be inconsistent with those sound principles of reason and policy, on which the common law of this country is founded.

Though the statute of Marlebridge provided a remedy against TENANTS FOR LIFE, and TENANTS FOR YEARS, by giving the owner of the inheritance an action, in which he would be intitled to recover damages for the waste committed, yet in as much as the recompence was frequently insufficient to answer the real damages committed, the statute of Gloster not only enlarged the measure of damages, by declaring that the place wasted should be recovered together with treble damages, as an equivalent for the injury, but also extended the remedy against tenants by the curtesie, and tenants in dower, who were till then, only punishable at common law.

At



At first sight, one would have been tempted to think, that the recompence here given, would be a very ample satisfaction for any injury any tenant for life might commit, but there are so many inconveniencies attending the prosecution of a suit under this statute, that it is very seldom adopted. — The more modern practice is for the owner of the inheritance to commence an action upon the case, in the nature of an action of waste, in which case, though he is not absolutely entitled to recover treble damages, yet he will obtain in damages, a recompence in proportion to the real injury he has sustained. By this means, the difficulties attending an action upon the statute are avoided, and the plaintiff as liberally paid, as if he had really recovered the place wasted, with the treble damages given by the act of parliament.

At common law, and under the statute of Gloster, the reversioner or remainder-

man,

man, might bring his action against tenants by the curtesie, and tenants in dower after they had even sold their estates, for as no privity subsisted between the alienee and the owner of the inheritance, and as the tenants by the curtesie and in dower, could not confer a privilege they themselves were not entitled to, the lands became equally forfeitable, in whosoever hands they were by the commission of waste; and this very remarkable and convincing reason is assigned, because, as the alienee would by the purchase become tenant *per auter vie*, and no action lay against tenants *per auter vie*, till the statute of Marlebridge, the consequence would have been, that the reversioner or remainderman would have lost his remedy, which the law will never suffer. The alienee could not be tenant by the curtesie, or tenant in dower, for such estates are only created by act of law, whereas, his estate originated by the mere act of the party; and such a transmutation of property

property, could never prejudice the owner of the inheritance, for that would make the law the instrument of injustice ; and therefore the common law right of action is never lost against tenants by the curtesie or in dower, by such a transfer of property.

Sometimes the law gave the damages to one and the inheritance to another, in an action upon the statute of Gloster ; as where an estate was limited to *A* for life, with reversion in fee to *B*, and they both joined in a lease to *C* for life. In this case Lord Coke says, in an action brought by the grantors, one shall have the damages, and the other shall recover the place wasted. And here it may not be improper to observe what inconveniences and difficulties arose, respecting the place wasted ; for if judgment had been recovered upon the statute of Gloster, against a tenant for life, for waste done in a house or a wood, unless the waste had been committed in the language of the law *sparsim*, the plaintiff

*B*

would

would only be entitled to recover the room or the spot where the tree grew, which often proved rather a burthen than otherwise to him; and for that reason, this action is pretty generally disused.

It is worth while to observe, how extremely cautious the law has been, in protecting the respective interests of the parties, and therefore, though tenants for life whether created by act of law or otherwise, were entitled to all privileges which were necessary for the benefit and enjoyment of their estates, yet if at any time they exercised those privileges to the prejudice of the inheritance, they immediately became responsible, by exposing their estates to forfeiture, *quoad* the particular part abused, and subjecting themselves to make good the damages they had committed: for however justly entitled a tenant for life may be to cut down timber to repair the house he lives in, to maintain his barns, to support his gates and stiles, and to make ploughs

ploughs for the tilling of his land ; yet if he cuts down timber and sells it, he thereby becomes subject to an action of waste, for converting it to an use he had no power by law to appropriate it to.

Here therefore the law interposes its authority, and gives the owner of the inheritance, an action against such tenants for life, either upon the statute or at common law. Nay further, if timber trees be cut down by a stranger, the owner of the inheritance, and not the tenants for life, shall have them ; and whoever takes them away, whether a stranger or the tenants for life, shall be answerable for the same in an action of Trover, to such owner of the inheritance. But there may be cases where even the owner of the inheritance shall not be able to support an action of Trover for timber trees cut down, either by the tenant for life, or a stranger ; as where an estate is limited to A for life, with remainder



der to *B* in tail, with remainder or reversion to *C* in fee, if timber trees be cut down by the tenant for life, more than are sufficient to answer the purposes and privileges incident to such estate for life, tho' *B* if living, may bring his action of Waste or Trover against *A*, yet if *B* dies, the action of *Waste* devolves upon *C* the owner of the inheritance, and the action of *Trover* for the timber will go to the executor or administrator of *B*, for the right of property in the timber, from the severance being once vested in *B*, that right as a personal one, will go to the executor or administrator of *B*, but not so compleatly as to enable the executor or administrator to support the action till demand and refusal of the timber has been proved; for though the right, vested in the executor, was a personal one, yet inasmuch as Trover always imports that kind of *Tort* which falls within the doctrine of personal actions, it will be absolutely necessary for such executor or administrator, to make a demand before he brings his action,



Great as these benefits are, and however well protected our property may be, both by the common and several statute laws, yet as preventive justice is infinitely preferable to punishing the offenders, either for wilful or ignorant acts of depredation, courts of equity have very wisely interposed their authority, and stopt the commission of those acts by injunction, which no damages, no pecuniary punishment, would ever be equal to repair. And here it will be necessary to remark, that as all courts of equity were introduced to correct the rigor of the common law, and the better to enable the judges of those courts to do equal and indifferent justice to all who appeal to them, such judges are bound to make the common law, the ground-work, the basis and the rule of their conduct; for it is their duty not to annihilate, but to improve that law, and render it more subservient to the general interests of mankind, by founding their judgments not on the rigid rule of right, but on the particular

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cular circumstances of the case, and tempering them with a moderation and lenity the common law, as a positive institution, is incapable of. For this reason it is, that whoever applies for an injunction, must shew himself owner of the inheritance; for as the common and statute law provided a remedy for him only who was entitled to the inheritance, the courts of equity, which found their jurisdiction upon these laws, expect the same right in the parties applying for its interposition, as would enable them to recover at law. And so very particular are those courts in their attention to the *Legal Rights* of the parties, that even in cases where an estate has been given to husband and wife for life, with remainder to the first and other sons of their two bodies begotten in tail male, with remainder to *B* in tail general; in this case, when the husband and wife have cut down timber *before issue born*, they have been enjoined from committing any further waste at the application of *B* the remainderman: for as *B*, *till issue born*,

*born*, was the apparent owner of the inheritance, he only was intitled to the timber. The court even refused to impound the money, till the event of issue *born*, &c. was determined, but decreed the money to be paid to the remainderman in the first instance, and upon this principle, because he only at the committing of the waste, was capable of supporting an action at common law or upon the statute, or to have recovered damages for the timber in an action of *Trover*, for though the remainderman could not bring *trespass*, because the tenant for life's *possession* prevented it, that action being merely possessory, yet when the timber was severed from the land, he might support an action of *Trover*, for as possession is the heartstring of trespass, so property alone gives a right to maintain *Trover*.

Indeed courts of equity have greatly extended their authority, and with great justice granted relief, (where no action of  
waste

waste lay either at common law, or upon the statute,) in the particular instance of a tenant in tail after possibility of issue extinct, whom they have restrained by injunction, from pulling down houses, cutting down trees which stood in the defence of the house, and fruit trees in the garden; and for this reason as I understand it, because, though he is dispunishable at common law, for the inheritance that once was in him, yet that law which exempted him from punishment for waste, did not give him a partial right to the inheritance, it gave him a right only to **USE AND ENJOY** and not to **ABUSE OR DESTROY** the inheritance. Such a power, would be inconsistent with every idea of an estate for life, and repugnant to justice and common sense. For the same reason it is, that where a tenant for life without impeachment of waste, pulls down houses, or attempts to destroy trees planted for the ornament of the house, a court of equity will restrain him by injunction; for the granting of an estate for life, without impeachment

peachment of waste, does not give such tenant for life a power to destroy the inheritance. A more striking case cannot be found to confirm the doctrine here maintained, than where upon an exception taken to the Master's report, because he had charged the tenant for life without impeachment of waste, with several sums for the repairs of *tenants houses* upon the estates, the court over-ruled the exception, and declared, that notwithstanding tenant for life is without impeachment of waste, yet he shall be obliged to keep tenants houses in repair, and shall not suffer them to run to ruin.

Indeed, in the case of a Bishop's lease, a tenant for years who at common law was not punishable for waste, and only made so by statute, tho' possessed of a term for years, without impeachment of waste, by the express grant of the owner of the inheritance, notwithstanding he was permitted to carry away the brick earth he had

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already



already dug, was still restrained by injunction from any further digging; for the lessee, tho' a tenant without impeachment of waste, shall not be permitted to destroy the field against the bishop, the reversioner in fee, to the ruin of the inheritance of the church. But if the bishop had granted a power to the lessee to dig brick earth, tho' it would have been equally as injurious to the inheritance, as the tenant's digging it under an idea of his not being subject to impeachment for waste yet even the bishop himself could not afterwards have prevented it—It is true that the bishop is the owner of the inheritance, but that he has such an absolute dominion over it, as a common lay person is entitled to exercise over his own estate, is at least disputable, for the owner of a lay inheritance may cut down trees, pull down houses, and do what he pleases, without being accountable to any one for his conduct; but a bishop most clearly cannot do any such thing, for if he pulls down  
the



the palace, or even lets it run to ruin, though as owner of the fee no action of waste, yet a prohibition at common law, lay against him, and upon his death, his executor would be subject to repair the damages in an action for dilapidations.

Besides the cases above referred to, which are confined merely to preventive justice, there are not wanting authorities to prove that courts of equity, where they have seen that the bare granting of an injunction would be insufficient to answer the true ends of justice, with a spirit that does honour to their proceedings, have not only exerted their authority to the utmost, but even extended it to do compleat justice.—A more conspicuous instance of the kind does not occur, than in that most excellent decree pronounced in the case of Lord Barnard, a decree which appears to be founded in the most sublime principles of justice and equity.—Lord Barnard who being only tenant for life, without impeachment

peachment of waste, had almost totally defaced the mansion-house, by pulling down great part, and was proceeding entirely to ruin it, was not only restrained from the commission of any further waste, but even compelled to repair the wanton injury done to the inheritance, and the more effectually to enforce the execution of so just a decree, the judge who pronounced it, appointed commissioners to see it carried into execution.

Having thus far endeavoured to shew the principles upon which injunctions for waste, against tenants for life, and tenants for years, have been granted, it may not be altogether useless and unnecessary to point out where the authority of courts of equity hath been exerted to restrain tenants for life, from the commission of waste, altho' *no act* had been *done*, but only an intention shewn, and a right of doing it claimed by the tenant for life. As where a bill was brought by the owner of the reversion,

version, against tenant for life, and no evidence of any actual waste, yet as he insisted upon his right, and it appeared he had none, the court granted an injunction; for it is not necessary that the owner of the reversion should wait till waste actually committed, it will be sufficient to prove that the tenant for life has no such power as he claims, or intends to exercise. In this case, tho' the reversioner could have no action at law till waste actually committed, yet the want of such a legal power to prevent a tenant for life from destroying perhaps the very beauty of the estate, instead of impeaching the authority of a court of equity, rather points out and confirms the wisdom of its interposition.

Moreover, there may be, and certainly have been cases, where no legal remedy ever existed; and yet courts of equity upon the soundest principles of justice and policy have interposed—particularly in the case of a mortgagee in fee in possession,  
 who

who has not only been restrained from committing any further waste, but absolutely decreed to account for the timber already cut down. Here no legal means could be pursued to prevent the mortgagee from committing waste; for being seized of the fee, he was legal owner of the inheritance, and as such, entitled to do what he pleased with it; but a court of equity in favour of the mortgagor will consider such estate, tho' absolute in law, merely as a security in the hands of the mortgagee, and will not suffer him to exercise that legal authority to the prejudice of the estate, and injury of the mortgagor.

The same doctrine equally holds good in the case of a trustee, who, if he cuts down timber, will not only be restrained but compelled to account for the profits arising from the waste committed; for if his conduct was to pass with impunity, it would defeat the very ends for which the estate

estate was conveyed to him. And here it may be proper to observe, that tho' in many cases a court of equity will direct an account to be taken of the profits arising from the waste committed, yet if the party has disposed of his interest before a suit instituted, it will leave the owner of the inheritance to seek his remedy at law; for wherever the court in a case of this kind, exerciseth a legal and equitable power, it is barely to prevent a multiplicity of suits---as in the case of a *bill brought for an account and satisfaction for waste, in cutting down trees, against an assignee of the lessee of a college, after an assignment of the term, and for the waste done before the assignment*, the court obliged the plaintiff to seek his remedy at law: but if the waste had been committed by the assignee, and an injunction as well as an account had been prayed, the court to prevent a double suit, would have entertained the bill; the principles upon which courts of equity

found



found their jurisdiction, being often calculated rather to prevent an injury, than to give satisfaction for it.—And upon a bill brought against the executors of a jointress to have a satisfaction out of assets for permissive waste, upon the jointure of the testatrix, the court dismissed the bill, and declared, that as the jointress was under no covenant to keep the jointure in good repair, like the common case, without some particular circumstances, there was no remedy in law, or equity for *permissive waste, after the death of the particular tenant.*

Whoever therefore seriously reflects upon the nature of injunctions, and considers the consequences of them, will see the utility, and admire the wisdom and policy of their introduction: for if an estate had been granted to *A* for life, with remainder to *B* for life, with remainder to *C* in tail. If *A* should commit waste, and *B* should refuse to join with *C* in an  
actio n

action for waste, *C* could have no such action till *B*'s death; and before that event might take place, the first tenant for life might ruin the inheritance. Again, if a lease be made to *D* for life, remainder to *E* *for life without impeachment of waste*, remainder to *I* in tail: if *D* should commit waste, in this case the remainderman in tail, could not support an action of waste, without the concurrence of the intervening tenant for life, and yet a court of equity will grant an injunction; for if the collusion of *E* with *D* was to be countenanced, it would be in the power of the first tenant for life with such connivance, to ruin the inheritance; but a court of equity will not suffer *D*, even with the concurrence of *C* the remainderman for life, tho' a tenant, without impeachment of waste, to act so injuriously to the inheritance. Let it suffice, that when *E* comes into possession, he is armed with a power of cutting down timber trees, and doing those acts which the pre-

D

ceding

ceding tenant for life has no authority to exercise, and therefore, till he is actually in possession, a court of equity will not suffer any collusion between him and an unprivileged tenant for life to prejudice the inheritance, to pass unnoticed and with impunity.

F I N I S.



